SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 730

THOMAS J. MOLLOY & CO., INC.,
Petitioner,

against

STEWART BERKSHIRE, as Deputy Commissioner of the Bureau of Internal Revenue, in Charge of the Alcohol Tax Unit, Treasury Department, HENRY MORGENTHAU, Jr., Secretary of the Treasury, and D. W. GRIFFIN, District Supervisor, Alcohol Tax Unit, Bureau of Internal Revenue, Second District of New York.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Walter Brower,
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INDEX

Page

Table of Cases Cited

Statutes Cited

Miscellaneous Citations

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Thomas J. Molloy & Co., Inc., respectfully prays that a writ of certiorari issue to review the judgment and decree of the United States Circuit Court of

Appeals for the Second Circuit filed in the above proceedings on July 7th, 1944 (R. 978), which judgment and decree affirmed by a unanimous Court the orders dated April 8th, 1942 (R. 914-920), May 18th, 1942 (R. 934-935) and August 6th, 1942 (R. 951-952) issued by the respondents.

I. Opinion of Court Below

The opinion of the Circuit Court of Appeals for the Second Circuit rendered by Augustus N. Hand, J., is reported in 143 F. (2d) 218 and is printed in the record (R. 971).

II. Summary Statement of Matter Involved

The matter involves orders issued by the respondents annulling, for alleged fraud, misrepresentation and concealment of material facts in its procurement, a basic permit as a wholesaler of distilled spirits, wine and malt beverages, issued under the Federal Alcohol Administration Act on July 1st, 1936 (R. 609) to the petitioner, an importer and wholesaler of liquors.

The petitioner was on May 25, 1935, and still is, the possessor and holder of a basic permit as an importer of liquors issued by the Federal Alcohol Control Administration on January 13, 1934 (R. 771).

A Wholesaler's Basic Permit was issued by the same authority to petitioner on July 1, 1936 (R. 609) on an application therefor dated October 26, 1935 (R. 601-608).

On April 8, 1942, the District Supervisor of the Alcohol Tax Unit of the United States Treasury Department issued an order, after hearings had, annulling the petitioner's Wholesaler's Basic Permit for fraud, misrepresentation and concealment of material facts in obtaining the said Wholesaler's Basic Permit.

Annulment proceedings had been brought and directed on similar grounds against both of the petitioner's basic permits, that is (a) the Wholesaler's Permit and (b) the Importer's Permit. The respondents, however, at the hearings withdrew the charges as affecting the Importer's Permit (R. 141). The hearings continued as to the Wholesaler's Permit and the proceedings directed against the Importer's Permit were accordingly dismissed (R. 879).

The orders appealed from annul the Wholesaler's Basic Permit for reasons which may be summarized as follows:

(a) That the applicant concealed material facts and made misleading statements in the application in that it misrepresented or concealed the full extent of the interests of principals and the sources and nature of the funds invested.

(b) That although SAMUEL M. BOMZON and THOMAS J. MOLLOY were represented as the true owners of stock, they held the said stock on behalf of SAMUEL RAPPAPORT and FRANK ZAGARINO who had, however, been disclosed in the application in the case of SAMUEL RAPPAPORT as Vice-President and director, and in the case of FRANK ZAGARINO as Treasurer, director and stockholder.

(c) That although there was a disclosure in the application as to SAMUEL W. RAPPAPORT as Vice-President and director; as to FRANK ZAGARINO as Treasurer, director and stockholder, respectively, the true extent and nature of their stock interest was not revealed.

(d) That although THOMAS J. MOLLOY was listed as President and director he did not perform the functions of those offices.

(e) That several of the stockholders and directors (all of whom had been fully disclosed in the application) had

not in the past been engaged in the business activities as stated by the application, but had been engaged at some time during the prohibition era in the illegal distribution of liquor.

The death of ZAGARINO prior to the issuance of the Wholesaler's Basic Permit eliminated from consideration in these proceedings any representations or interests in the applicant corporation concerning the said ZAGARINO (R. 952).

The application and affidavits for the basic permit in question were executed by THOMAS J. MOLLOY, the principal witness for the respondents (R. 92-104).

Petitioner has been conducting its wholesale and importing liquor business regularly since the issuance of both of the permits and pending the final determination of these proceedings.

There have been no charges or findings of illegality or irregularity on the part of petitioner or any of its officers, directors or stockholders since the issuance of the mentioned permits. The petitioner established a very substantial business. The record discloses that petitioner did a volume of over $3,783,000 business during the year 1940, employing 153 employees (R. 471-472).

There were no findings that there were any persons interested in the petitioner corporation who had not been revealed to the Federal Alcohol Administration at the time that the application was filed. There was no evidence and consequently no findings that any of the directors or stockholders of the petitioner had ever been arrested or charged with a criminal offense, much less convicted of a crime. On February 4, 1937 (R. 683), January 12, 1938 (R. 685), March 7, 1938 (R. 695) and April 3rd, 1939 (R. 697) the stock of SAMUEL BOMZON in applicant corporation was formally transferred to SAMUEL W. RAFFAPORT. Notice of

this transfer was duly given to the Administrative Authority who acknowledged receipt thereof on February 9, 1937 (R. 684), January 20, 1938 (R. 686) and April 10, 1939 (R. 699). No objection to this transfer was made or indicated by the Federal Alcohol Administration.

III. Jurisdiction of This Court

The jurisdiction of this Court is invoked under Title 28 Judicial Code and Judiciary, Section 347 (a) (Judicial Code Section 240 (a) amended and under Section 4 (h) of the Federal Alcohol Administration Act (49 Stat. 977, 27 U. S. C. A. 204 (h)). The order and decree to be reviewed was filed on July 7, 1944 (R. 979). Upon application duly made by petitioner, an order was made by Mr. Justice Jackson, dated September 13, 1944 (R. 980), which extended the time to file this petition to December 5, 1944. The petition is timely within the requirements of Section 243 of the Judicial Code of the United States (U. S. C. Title 28, Section 350).

IV. Statute Involved

Section 3 of the Federal Alcohol Administration Act (49 Stat. 977), 27 U. S. C. (203), in substance makes it unlawful to operate a liquor business without obtaining a basic permit. Section 4 of the Federal Alcohol Administration Act, 27 U. S. C. 204, specifies who are entitled to basic permits. The relevant provisions are:

> "Section 204. Permits
>
> (a) Who entitled thereto. The following persons shall, on application therefor, be entitled to a basic permit:
>
> (1) Any person who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government.

(2) Any other person unless the Secretary of the Treasury finds (A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to date of application, been convicted of a felony under Federal or State law or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experience, financial standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal Law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted.

* * * * * * *

(e) A basic permit shall by order of the Secretary of the Treasury, after due notice and opportunity for hearing to the permittee, * * * (3) be annulled if the Secretary finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact. The order shall state the findings which are the basis for the order."

V. Questions Presented

The following questions are presented:

1. Was petitioner entitled to a Wholesaler's Basic Permit as a matter of right under Section 4 (a) (1) of the Federal Alcohol Administration Act (Title 27, U. S. C. 204 (a) (1)) since it held on May 25, 1935, a basic permit as an importer of liquor issued by the Federal Alcohol Administration?

2. Does Administrative Regulation No. 1, Section 3 (b) of Article II (R. 909), illegally alter and restrict the Statutory provision (Section 4 (a)(1)) of the Act by limiting the

issuance of basic permits *to the same type or class* as that held by the applicant since the statutory provision makes no such restriction or limitation?

3. If petitioner was entitled to a Wholesaler's Basic Permit as a matter of right under Section 4 (a)(1), is the permit subject to annulment under Section 4 (e)(3) of the Act for alleged fraud, concealment and misrepresentation of the extent of the interest of the officers and stockholders in the corporation and their prior alleged illegal activities?

4. Would the Federal Alcohol Administrator have had power to refuse to issue the basic permit to the petitioner on the grounds of alleged illegal distribution of liquor by its stockholders or officers notwithstanding the statutory limitations on his power contained in subdivision A of Section 4 (a)(2) of the Federal Alcohol Administration Act which limits such grounds for refusal to issue a basic permit to convictions only, for the limited period of five years prior to the date of application, for a felony under Federal or State law and three years for a misdemeanor under Federal law only relating to liquor including taxation thereof?

5. Did subdivision B of Section 4 (a)(2) of the Federal Alcohol Administration Act empower the Administrator to refuse a permit to petitioner on the grounds of alleged illegal transactions in the distant past on the part of some of the officers, directors and stockholders notwithstanding the Administrator's explicit limitations in subdivision A of the said section and the legislative history and context of the section?

6. Since subdivision B of Section 4 (a)(2) of the Federal Alcohol Administration Act refers to the applicant person and not to its officers, directors and stockholders where the

applicant is a corporation, as does the preceding subdivision of the section, was the Administrator under said subdivision of the section restricted, for the purpose of determining commercial qualifications of the applicant, to ascertainment of the business experience, financial standing or trade connections of the corporate applicant as such, as distinguished from the moral background of its officers, stockholders and directors as covered by subdivision A of the said section?

7. Were the alleged concealments or misrepresentations material in the light of the restricted statutory powers of the Federal Alcohol Administrator?

VI. Reasons for Allowance of Writ

1. The Circuit Court of Appeals for the Second Circuit has decided a federal question in a way probably in conflict with the applicable decisions of this Court.

A. *As To Amendment and Restriction of the Statute by Administrative Regulation.*

Section 4 (a)(1) of the Act (Title 27 U. S. C. 204 (a)(1)) provides in plain and clear language that the holder of a basic permit as a distiller, rectifier, wine producer or importer on May 25th, 1935 is entitled as a matter of right to another basic permit. It does not limit the type of other basic permits to which a holder is entitled.

The Administrative Agency has, however, by its Regulation No. 1, Section 3 (b) Article II, limited the statutory right to basic permits of the same class only (R909).

The Circuit Court of Appeals has failed to follow the clear language of the statute and has based its decision in this respect on the import of the said Administrative Regulation (R973). The Court has thereby ruled in effect that an Administrative Agency may by regulation alter, amend

or extend a statute. Its decision to that extent failed to follow and is in conflict with the rules established by this Court in *Morrill* vs. *Jones*, 106 U. S. 466; *United States et al* vs. *Missouri Pacific Railroad Co.*, 278 U. S. 269; *United States* vs. *Goldenberg*, 168 U. S. 95; *Palmer* vs. *Hoffman*, 318 U. S. 109, 114; *Addison* vs. *Holly Hill Fruits Products, Inc.* 64 Sup. Ct. 1215, 217 Last Term, decided June 15, 1944.

The Court in these cases firmly established the rule that where no ambiguity exists there is no room for construction and further, that an Administrative Agency cannot by its regulation put into the body of a statute a limitation which Congress did not think it necessary to prescribe.

B. *As to subdivision B of Section 4 (a)(2) of the Federal Alcohol Administration Act.*

1. *Statutory Construction.* The Circuit Court of Appeals in this case has construed subdivision B of Section 4 (a)(2) of the Act to mean in effect that the Administrator of the Act is vested with a power of discretion to refuse a basic permit to an applicant who in his prophetic opinion is not likely by reason of his past experience to maintain operations in conformity with Federal law. The construction of the term "business experience" as used in said section is said in effect by the Court to include experience involving violation of law in the distant past on the part of the applicant. This despite the fact that subdivision A of the same section by discriminating language limits the power of the Administrator to refuse permits to applicants who have been convicted within five years of a felony or within three years of a certain class of misdemeanor. Such construction places a greater burden upon a person who has not been convicted of a crime than upon one who has been convicted more than five or three years respectively prior to the date of the application. It therefore leads to absurd conse-

quences. To that extent the decision of the Circuit Court of Appeals is deemed to be in conflict with the decision of this Court in *United States* vs. *Katz, et al*, 271 U. S. 354.

2. The ordinary and common accepted meaning of the terms "business experience" and "trade connections" as used in the context of subdivision B of Section 4 (a)(2) of the Act are *commercial* in nature. The construction of these terms in a manner which vests in the Administrator a power of discretion to refuse a permit to an applicant on *moral fitness* grounds is contrary to the rulings in the cases of *Addison* vs. *Holly Hill Fruits Products, Inc.* (supra); *Morrill* vs. *Jones* (supra); *Old Colony Railroad Company* vs. *Commissioner of Internal Revenue*, 284 U. S. 552, 560. This court, in the above cases, held that Congress must be presumed to have used words in their ordinary signification and that the material meaning of words cannot be displaced by retrospective expansion of meaning.

3. The decision of the Circuit Court of Appeals vests discretionary power in the Administrator to refuse a basic permit where there is some evidence that the applicant in the distant past, not circumscribed by time, committed law violations, which did not result in convictions. Such a construction and the power appropriated thereunder is unreasonable, arbitrary and capricious, with no relation to the object sought to be attained and is in violation of due process under the Fifth Amendment to the Constitution, and in conflict with the decisions of this Court in *Nebbia* vs. *Peo. of the State of New York* 291 U. S. 502; *Currin* vs. *Wallace* 306 U. S. 1, 14.

The Administrator's authority for refusal of a basic permit to an applicant because of alleged illegal activities in the past is defined and limited clearly in Subdivision A of Section 4 (a)(2) of the Act and so is definitely fixed by statutory time limitation. The ruling by the Circuit Court

of Appeals that under subdivision B of the section there is authority for denial of a basic permit because of law violations, let alone convictions, is contrary to the plain statutory language. This statutory language prescribes the use of discretion in passing on the applicant's qualifications based on "business experience", "financial standing" or "trade connections".

A construction of the Statute as urged by the petitioner, which limits the authority to refuse a basic permit under subdivision A of Section 4 (a)(2) of the Act because of past convictions within the prescribed statutory time (*moral fitness grounds*) or under subdivision B of the section on the basis of inadequate *commercial* qualifications, is in accordance with the clear meaning of the Statute. It thus attains the Legislative objects and intent and so avoids denial of and conflict with due process under the Fifth Amendment of the Constitution.

This Court has ruled that a statute should be construed so as to maintain its constitutionality and insofar as the lower court's construction conflicts with this rule it fails to follow this Court's decision in *El Paso & N. E. R. Co.* v. *Gutierrez*, 215 U. S. 87, 96.

2. The Circuit Court of Appeals has decided an important question of federal law, important to the administration of the statute, which has not been but should be settled by this Court.

A. The court below has construed subdivision B of Section 4 (a)(2) of the Act to mean that the Administrator is vested with broad unlimited discretionary power to prophetically determine whether an applicant is possessed of sufficient *moral* stamina to enable it to maintain operations in conformity with Federal Law.

Yet the context of Section 4 of the Act and its legislative history (74th Congress, Record page 11714 House Con. Re-

ports 1898 H.R. 8870 Vol. 4, p. 10) shows Congressional intent to circumscribe the power granted by the Act. It is plain that by the Act, authority was granted and the power carefully and by discriminating language limited under Subdivision A of Section 4 (a)(2) of the Statute to decline basic permits on defined *moral fitness* grounds, limited as to class of offense and time of conviction therefor. Under subdivision B of said section, the authority to refuse a permit is limited to *business* or *commercial* inadequacies.

The construction of the statute by the Circuit Court of Appeals, however, vests in the Administrator power to refuse a basic permit for alleged misdeeds unlimited as to time or nature and in complete disregard of the applicant's current uprightness and integrity, all in direct violation of Congressional intent and recognition as manifested by the legislative history of the Act and the clear language thereof.

Such construction results in a nullification of subdivision A of Section 4 (a)(2) of the Act and adds to the statute by judicial construction an additional ground for denial of a permit. Therefore, a question of Federal Law is posed which is of national importance in the administration of the Federal Alcohol Administration Act, and which has not been but should be settled by this Court.

B. The answer to the questions herein presented affect numerous applicants and holders of permits throughout the United States. The public importance of the question is, therefore, obvious and calls for an expression and construction by the highest Court of the land. Research fails to disclose that this Court has yet construed this section of the Statute under consideration by this petition or judicially commented on the powers exercised thereunder by the Administrator, although the construction and proper exercise of power thereunder governs the issuance and revocation of permits involving a large number of business owners

located throughout the Nation, employing thousands in help and affecting investments of many millions of dollars. This Court will grant a writ of certiorari where an interpretation of an important provision of a Federal Statute and the powers of a Federal Administrator thereunder are involved. It has likewise been held that such a writ will be granted where a decision with respect to the enforcement of such a statute and such powers constitute a precedent of general application. *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285.

Conclusion

It is respectfully submitted that this petition for a writ of certiorari to review the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit should be granted, and the judgment and decree of the Circuit Court should be reversed.

WALTER BROWER,
Counsel for Petitioner.

COLEMAN GANGEL,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 730

THOMAS J. MOLLOY & CO., INC.,

Petitioner,

against

STEWART BERKSHIRE, AS DEPUTY COMMISSIONER OF THE BUREAU OF INTERNAL REVENUE, IN CHARGE OF THE ALCOHOL TAX UNIT, TREASURY DEPARTMENT; HENRY MORGENTHAU, JR., SECRETARY OF THE TREASURY, AND D. W. GRIFFIN, DISTRICT SUPERVISOR, ALCOHOL TAX UNIT, BUREAU OF INTERNAL REVENUE, SECOND DISTRICT OF NEW YORK,

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The opinion of the court below is reported officially in 143 F. (2d) 218 and is printed in the record (R. 971).

II. Jurisdiction

The jurisdiction of this Court is invoked under Title 28, Judicial Code, and Judiciary Section 347(a) (Judicial Code Section 240(a) amended) and under Section 4(h) of the Federal Alcohol Administration Act (49 Stat. 977, 27 U. S. C. 204 (h)).

The judgment and decree to be reviewed was filed in the Office of the Clerk of the Circuit Court of Appeals for the Second Circuit on July 7th, 1944 (R. 979). Upon application duly made on September 13th, 1944, an order was made by Mr. Justice Jackson of this Court which extended petitioner's time to file this petition to and including December 5th, 1944 (R. 980). The petition is timely within the requirements of Title 28 U. S. C., Section 350 (Judicial Code Section 243).

III. Statement of the Case

A summary statement of the matter involved has been made in the annexed petition for certiorari, pages 2, 2-5, which is hereby adopted and made a part of this brief as a statement of the case.

IV. Specification of Errors To Be Urged

The United States Circuit Court of Appeals for the Second Circuit has erred in ruling that:

(A) the petitioner was not entitled to a Wholesaler's Basic Permit as a matter of right.

(B) a regulation of the Administrator adding to the plain and clear meaning of the statute is determinative of its meaning.

(C) in effect the Administrator's Regulation 1, Section 3(b) of Article II has extended and enlarged the statutory provision as contained in Section 4 (a)(1) of the Federal Alcohol Administration Act, Title 27, U. S. C. 204 (a)(1).

(D) the permit was procured through concealments and misrepresentations of material facts.

(E) under subdivision B of Section 4 (a)(2) of the Act, the Administrator is vested with a broad discretion to

refuse a permit to a corporate applicant some of whose stockholders or officers in the distant past, unlimited as to time, are alleged to have violated a law.

(F) the facts allegedly concealed were material.

(G) the orders of respondents annulling the Wholesaler's Basic Permit of petitioner should be affirmed.

V. Summary of Argument

(A) Petitioner's holding of a basic permit as an importer on May 25, 1935, entitled it as a matter of right to the issuance of a Wholesaler's Basic Permit.

(B) Since petitioner was entitled to a Wholesaler's Basic Permit as of right under Section 4 (a)(1) of the Act by virtue of its possession of an Importer's Basic Permit on May 25, 1935, the alleged misrepresentations or concealments were immaterial.

(C) The power of the Administrator to decline a basic permit is limited by subdivision A of Section 4 (a)(2) to *moral fitness* grounds, and under subdivision B of said section is limited to grounds of inadequacy of a *commercial nature*.

(D) Respondents had no authority to annul petitioner's Wholesaler's Basic Permit upon the grounds of alleged misrepresentation or concealment concerning prior activities of some of its stockholders, officers and directors since by Subdivision A of Section 4 (a)(2) of the Act, prior illegal activities of applicants as a bar to a permit are limited and defined both as to type of offense and time, and under Subdivision B of said section the Administrator's discretion is limited to appraising business potentialities of the applicant persons and not to its stockholders, officers and directors where the applicant is a corporation.

(E) The construction placed upon Subdivision B of Section 4 (a)(2) of the Act by the Respondents and affirmed by the Circuit Court would render this portion of the Act unconstitutional under the Fifth Amendment as a denial of due process.

(F) There were no concealments or misrepresentations of material facts.

VI. Argument

A. Petitioner's holding of a basic permit as an importer on May 25, 1935, entitled it as a matter of right to the issuance of a wholesaler's basic permit.

It is clear beyond any conceivable doubt that Section 4 (a)(1) of the Act entitles any person who, on May 25, 1935, held a basic permit as a distiller, rectifier, wine producer or importer, issued by an agency of the Federal Government, to a basic permit under the Act as a matter of right without further showing, upon application therefor.

Petitioner submits that the clear and plain meaning of this section is that one who held any one of such designated permits on May 25, 1935, was entitled to any basic permit.

On May 25, 1935, petitioner was and still is the holder of a basic permit as an importer of liquors issued on January 13, 1934, by an agency of the Federal Government (R. 771). Hence it was entitled under the Act to a basic permit as a wholesaler. It's right to a basic permit was not limited by statute to a basic permit of a specific or limited type or class. However, the Circuit Court of Appeals in its decision in this case stated:

> "It is apparent from this reasonable regulation, which directly conformed in language to the provisions of Section 4 (a)(1) of the Act, that persons holding basic permits of certain specified types on May 25, 1935,

might obtain new basic permits *of the same class.*" (R. 974) (Italics ours).

The Circuit Court has thus approved the attempted alteration and extension of the statute by the Administrative Regulation to the extent that the regulation has limited the statutory right to *any* basic permit by the holder of a basic permit to new basic permits *of the same class only.* It is a well established rule of law that statutes may not be altered or enlarged by an Administrative Regulation.

The following statement by Chief Justice Waite in *Morrill* v. *Jones*, 106 U. S. 466 is apposite:

> "The Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. * * *. The Statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of superior stock. This is manifestly an attempt to put into the body of the Statute a limitation which Congress did not think it necessary to prescribe."

Furthermore, the regulation did not conform in language to the provisions of Section 4 (a)(1) of the Act, as the Act did not specify that the applicant was only entitled to a permit of the same class as already possessed. Indeed, one holding a basic permit would have no need to apply for another permit *of the same class.* This is manifest from the provisions of Section 4 (g) of the Act which continues basic permits without necessity of renewal until there is a surrender, revocation or suspension. The regulation attempts to insert into the body of the statute this meaningless limitation.

Congress distinguished the persons entitled to fall within the application of Section 4 (a)(1) from the succeeding subdivision of the Act when it expressed that "any other person" shall come within the latter subdivision.

It was held in *United States* v. *Goldenberg*, 168 U. S. 95, that statutes should be interpreted so as to be given their plain and clear meaning. This Court said in the case of *United States et al.* v. *Missouri Pacific Railroad Company*, 278 U. S. 269:

> "The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case * * * It is elementary that where no ambiguity exists there is no room for construction".

Again this Court said in the case of *Palmer* v. *Hoffman*, 318 U. S. 109, 114:

> "If the act is to be extended to apply not only to a 'regular course' of a business but also to any 'regular course' of conduct which may have some relationship to business, Congress not this court must extend it".

Justice Frankfurter speaking for this Court in the case of *Addison* v. *Holly Hill Fruits Products, Inc.* (*supra*), said:

> "Construction is not legislation and must avoid that retrospective expansion of meaning which properly deserves the stigma of judicial legislation".

Respondents and the decision in the court below attempt to buttress their position by citing from the House Ways and Means Committee report wherein it is stated that

> "All persons who held a basic permit * * * are, under the bill entitled as a matter of right to permits * * * except wholesalers". (H. Rept. 1542 Federal Alcohol Control Bill, P. 8, 74th Congress, 1st Session).

The reference to "wholesalers" in the cited legislative report is to a wholesaler who was not possessed of a basic permit either as distillers, rectifiers, wine producers or importers, whereas petitioner had a basic permit as an

importer. A further reading of the legislative history is convincing on this score.

> "wholesalers held only temporary basic permits at the time of the termination of the code system. The temporary basic permits were issued without the usual investigation. *The other permittees* under the code system were issued permits after they demonstrated that they did not have records as law violaters and that by reason of their previous experience, financial standing, and trade connections they were potential legal members of the industry. (H. Rept. 1542, 74th Congress 1st Session, Federal Alcohol Control Bill, p. 8)" (emphasis supplied).

Petitioner holding an importer's basic permit was one of "the other permittees" mentioned in the foregoing legislative comment and had been fully investigated and passed upon as a prerequisite to the issuance of the Importer's Basic Permit. It was the intention of Congress to allow persons who had already been investigated in connection with the issuance of the basic permits so held by them, the absolute right to any additional basic permits under the Act without further investigation as required under Section 4 (a)(2) of the Act.

Furthermore, Section 4 (a)(1) of the Act clearly expresses this Congressional purpose. There is no ambiguity in the statute. This Court in *Addison* v. *Holly Hill Fruits Products, Inc.* (supra) said:

> "Congressional purpose, as manifested by text and context, is not rendered doubtful by legislative history."

In the case of *United States* v. *Missouri Pacific Railroad Co.* (supra) this Court said:

> "But where the language of an enactment is clear, and construction according to its terms does not lead to

> absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed * * *".

The decision of the Circuit Court of Appeals in this case leads to an anomalous and absurd result. The Government reposes faith and confidence in petitioner as an importer of liquor but not as a wholesaler of the same commodity. In the absence of a reversal of this decision, petitioner is in the unusual position of being licensed by a Federal agency to import and sell liquor from foreign parts but its right to purchase and sell domestic products of the same commodity is denied by the same Federal agency. All statutes should receive a sensible and reasonable construction. Constructions leading to absurd or unreasonable results must be avoided. *U. S.* v. *Katz et al*, 271 U. S. 354.

There was no waiver by petitioner. The fact that the petitioner, when applying for its basic permit as a wholesaler did not insist that it was entitled to the same as a matter of right merely upon showing the possession of its Importer's Basic Permit did not under any principle of law constitute a waiver of its statutory rights, notwithstanding an indication to that effect in the decision of the Circuit Court of Appeals in this case (R. 975).

It follows that if petitioner was entitled to a permit as a matter of right, no issue can arise with respect to whether it was procured through fraud, misrepresentation or concealment of material facts in connection with the application. Such representations or concealments would not be material to the issuance of a basic permit predicated upon the holding by the applicant of another basic permit at the time.

B. Respondent district supervisor had no authority to annul petitioner's wholesaler's basic permit upon the grounds of misrepresentation concerning prior activities of some of its stockholders.

The power of the administrator to decline a basic permit is limited by subdivision A of section 4 (a) (2) to moral fitness grounds, and under subdivision B of said section is limited to grounds of inadequacy of a commercial nature.

The power of the Administrator is statutory and his power to deny a basic permit is derived exclusively from the statute, regardless of his personal inclinations.

No power is found in the Federal Alcohol Administration Act vesting in the Administrator discretionary power to refuse a permit whenever he determines that the applicant does not possess sufficient moral stamina to enable him to maintain operations in conformity with Federal Law.

Consequently, if the facts found by the Administrator as having existed had been disclosed by the applicant, the Administrator would not have had the discretionary power to refuse the permit.

The statute manifests a deliberate purpose by discriminating language on the part of Congress to withhold from the Administrator unlimited discretion.

The legislative history of the Act amply supports this construction. Representative Cullen, Chairman of the subcommittee which considered the bill for the House Ways and Means Committee, introduced the same in the House. During the discussion of the bill in the House on July 23rd, 1935, he said:

> "Further wherever power is granted by the bill to put into effect a policy contemplated by the bill, discriminating language has been used so that the bill, if enacted, will not suffer from the infirmity of invalid dele-

gation of legislative power". (74th Congressional Record page 11714).

A suggestion for liberal construction of the statute in favor of broader powers for the Administrator is not embodied in the Act. The statute is designed primarily for the purpose of regulating commerce and the protection of revenue. (Federal Alcohol Administration Act, Section 3, Title 27, U. S. C. 203, House Ways and Means Com., Report to 74th Congress 1st session HR1542, page 1, bill 8870).

A mandatory directive is made in Section 4 of the Act which requires that permits be issued to all persons unless excluded for specified reasons as set forth in the several subdivisions of this section. Significantly, the enacting authorities specified and limited the power of the Administrator separately in each subdivision of the section as to each phase of the function of granting and denying the permits. A brief analysis of this characteristic of the section involved serves to emphasize the Congressional purpose.

Subdivision (a)(2) of Section 4 of this Statute is written in three distinct parts designated as "A", "B" and "C" respectively. To each part a clear and specific classification of cause for refusing a basic permit is assigned.

Subdivision C concerns itself with proposed operations in violation of State laws, and is consequently not material to our discussion.

Subdivision A authorizes refusal of a permit to applicants who had been law violators as established by conviction. This subdivision finds its genesis in the following suggestion of the House Ways and Means Committee.

> "These requirements are desired to exclude from the industries persons who would be likely to violate provisions of the bill and other Federal and State laws". (H. Report 1542, Federal Alcohol Control Bill, page 8, 74th Congress 1st session).

This subdivision of Section 4 is the *moral fitness clause* from which the Administrator draws power to exclude those applicants of determined objectionable moral fiber.

In subdivision B of Section 4 (a)(2), the Act concerns itself exclusively with the *business or commercial* aspects of the applicant. From this subdivision the Administrator draws his power to exercise judgment and discretion as to fitness of the applicant from the business or commercial point of view.

The decision of the Circuit Court of Appeals in this case surprisingly holds, however, that subdivision B of Section 4 (a)(2) of the Act empowers the Administrator in his discretion to refuse to issue a basic permit where a stockholder of the applicant in the unlimited past has violated a law.

Clearly such a construction of the statute renders subdivision A thereof a nullity. Moreover, its consequence is an absurdity, as it would place a greater burden on mere suspects than on convicts, hence is in conflict with the established rules of construction. *United States* v. *Katz, et al.* 271 U. S. 354.

The legislative history of these subdivisions of the Section as revealed by the House Conference Reports is particularly illuminating in this direction. The House Conference Reports disclose that the House Bill

> "provided that applicants * * * should not be entitled to the permit if it were found that the applicant had within five years * * * been convicted of a felony. The Senate amendment adds an additional requirement that the applicant must not have been convicted in such period of a violation of a Federal law relating to liquor * * *. The house recedes with an amendment providing that the applicant must not have been convicted within a period of three years * * * of a misdemeanor under Federal Laws relating to liquor * * *" (excerpt from H. Conference Reports

1898, vol. 4, page 10, 74th Congress 1st session repor to accompany H.R. 8870).

Thus, the five year limitation as proposed by the Senat amendment for the violation of a Federal law relating t liquor was limited and reduced by the House and finall passed with a limitation period of three years involvin a misdemeanor under Federal laws relating to liquor. There can be no mistake that Congress enacted the bill in fina form with the purpose of limiting the time within whic prior misdeeds of applicants should be a bar to the issuanc of a basic permit. Congressional awareness of time limita tions as to past illegal acts in connection with this enact ment and its deliberate purpose to circumscribe the effect thereof upon the issuance of basic permits is so apparen as to allow for no controversy. It is further illustrated b the fact that the enactment did not specify misdemeanor generally as a bar to a permit but limited it to misdemeanor arising only out of Federal liquor laws. And then, thi specific type of misdemeanor is a bar only if the conviction therefor was had within three years from the time of th application. Despite this, however, the decision of the Cir cuit Court of Appeals in this case allows to the Administra tor broad discretionary power to refuse a basic permi when he finds some evidence that the applicant in the un limited past has committed a law violation which has no even been established by conviction.

The provisions of subdivision B of Section 4 (a)(2) ar concerned with "business experience", "financial stand ing" and "trade connections" of the applicant. The clea meaning of the terms "business experience", "financia standing" and "trade connections", particularly in view o the context of the words "financial standing" as used be tween these terms in subdivision B precludes a construc

tion which authorizes refusal of a permit under this subdivision on *moral fitness* grounds. The terms could only be used in a *commercial sense* according to their natural and ordinarily accepted use and meaning. Websters New International Dictionary, Second Edition 1944, defines,

"TRADE —Act or business of exchanging commodities by barter, or by buying and selling for money; commerce traffic."

"BUSINESS—Any particular occupation or employment engaged in especially for livelihood or gain."

This Court in the case of *Helvering* v. *Hutchings*, 312 U. S. 393, 396, has held that the Supreme Court in construing a statute will assume that Congress intended to use the words thereof in their natural sense. The plain meaning of a statute has great weight in statutory construction.

Again it has been held in the case of *Addison* v. *Holly Hill Fruits Products, Inc.* (supra):

> "* * * nor is English speech so poor that words were not easily available to express the idea * * *. After all, legislation when not expressed in technical terms is addressed to the common run of men * * *".

The context and language of this subdivision of Section 4 (a)(2) indicates Congressional concern with the business potentialities of the applicant. In this subdivision, as well as in the succeeding sections of the Act (4D, 5, 6; 27 U. S. C., Sections 204D, 205, 206), there is plainly stated the Congressional interest in the business or commercial aspects of the applicant's qualifications. These sections specify particularly the requisite elements that business operations be commenced within a limited time so that there will be conformance with Federal law and generally seek to

obviate the possibility of interlocking corporate directorates of an applicant with other permittees; the elimination of restraints of trade and all other objectionable *commercial* practices.

The statute by the term, "to maintain operations in conformity with Federal law" does not vest the Administrator with the unlimited power to refuse a permit to one who in the distant past violated any law. The context of this phrase shows Congressional reference to *business* or *commercial* probabilities of the applicant. The yardstick to determine eligibility with respect to *moral fitness* based on past activities is set up and established in the preceding subdivision of the section (4(a)(2)(A)). By the requisite standards expressed in the statute in the use of the phrases "business experience", "trade connections" and "financial standing", Congress expresses an intent to require the issuance of permits to those most likely to maintain financially successful establishments. Generally a more successful business is less likely to violate the law under which it operates. It is reasonable to argue that were it the Congressional intent to authorize discretionary power to bar permits under subdivision B of Section 4 (a)(2) because of unspecified law violations in the unlimited past or for infamous past activities or associations, it would have so clearly stated. The phrases of business and commercial significance, "business experience", "trade connections" and "financial standing" would not have been used for that purpose. The legislative history and draftmanship of the statute show that it has been drafted with discriminating care in the use of language and the creation of scope of authority. (Statement by Congressman Cullen, 74th Cong., 1st Session, Record Page 11714 *supra.*)

From context and language the conclusion is that this subdivision was not intended to be used to "screen out"

applicants whose history show illegal activities or associations. By the statutory use of the terms "business experience", "trade connections" and "financial standing", there was not directed a searchlight on past illegal and clandestine activities of applicants. Such activities do not connote business experience, or trade connections, or financial standing.

As used in the statute, the terms "business experience", "trade connections", "financial standing" refer to qualifications of the applicant person and in case of a corporation does not embrace officers, stockholders or directors.

The applicant, at the time of the application, was and still is a corporation conducting a large business as an importer of liquors (R. 772). Under the statute, the Administrator in passing on the application was to be concerned with the business experience of this corporate applicant, its current trade connections and its financial standing. Subdivision B of Section 4 (a)(2) of the Act (Title 27, U. S. C. 204 (a)(2)(B)). The applicant's ability to commence operations under the permit applied for was dependent on whether this corporation had financial standing, the extent of its business experience or activites and its trade connections. These were elements which the Administrator could use as guideposts in determining the business potentialities of the applicant *after* he had determined under subdivision A of Section 4 (a)(2) of the Act that there were no disqualifying elements involving convictions of any of its stockholders, officers or directors.

That under subdivision B of Section 4 (a) (2) the business potentialities of the corporate applicant only are under scrutiny is clear from the statutory language and context.

For the purpose of instant clarification, we quote the relevant parts of the two subdivisions.

Subdivision A	*Subdivision B*
"That such person (or in case of a corporation *any of its officers, directors or principal stockholders*) has within five years prior to date of application been convicted of a felony under Federal or State law • • •."	"That such person is by reason of his business experience, financial standing or trade connections not likely to commence operations within a reasonable period or to maintain such operations in conformity with the Federal law."

The exclusion of the reference to officers, directors or principal stockholders under subdivision B, after its presence in the preceding subdivision, precludes inclusion by implication.

This Court speaking through Mr. Justice Holmes in *United States* v. *Atchison T. & S. Railway Company*, 220 U. S. 37, made relevant comment on this subject as follows:

> "The presence of such a provision in the one part and its absence in the other is an argument against reading it as implied."

Manifestly the words "business experience," "financial standing" and "trade connections" refer to the corporate applicant and not to its officers, directors or stockholders.

The petitioner, a corporate applicant, had been operating as an importer of liquors for some time past (R. 771) and its current trade connections were to be considered.

It follows that had the facts allegedly concealed or misrepresented concerning the officers, stockholders or directors been disclosed, the Administrator would not have had the statutory authority to refuse a permit under subdivision B of Section 4 (a)(2) of the Act, and the statements consequently were immaterial. (*Matter of Farley*

v. *Miller*, 216 N. Y. 449). It must, therefore, be submitted that the permit was not procured through fraud, misrepresentation or concealment of material facts and no authority existed for annulment under Section 4 (e) of the Act.

C. The construction placed upon subdivision B of section 4(a) (2) of the act by respondents and affirmed by the Circuit Court would render this portion of the Act unconstitutional under due process.

The decision of the lower court to the extent that it approves and confirms the discretionary power arrogated by the Administrator under subdivision B to refuse a permit because of prior illegal acts of a stockholder of a corporate applicant is in conflict with the due process clause of the Fifth Amendment to the Constitution because it is unreasonable, capricious, discriminating and arbitrary.

Nebbia v. *Peo. of the State of New York*, 291 U. S. 502.

The means selected have no real, appropriate and substantial relation to the objects sought to be attained.

Virginian Railway v. *System Federation*, 300 U. S. 515; *Currin* v. *Wallace*, 306 U. S. 1, 14.

This conclusion is inevitable since the decision holds that there is a right to bar a permit under subdivision B of the section for past law violations when the clear object and purport of the subdivision by the use of the terms "business experience," "trade connections" and "financial standing" is a sifting of applicants on the basis of *commercial* ability to operate the proposed licensed business in conformity with Federal law. An Act should not be construed in a manner so as to render it unconstitutional when a Constitutional construction is possible. *El Paso & N. E. Ry. Co.* v. *Gutierrez*, 215 U. S. 87.

D. There was no concealment or misrepresentation of material facts.

It is, of course, basic that the facts alleged to have been misrepresented or concealed must have been material in order to justify proceedings and annulment after issuance of the permit.

The essence of such proceedings and object is the procurement of the permit which otherwise would not have been granted but for the alleged misrepresentations or concealment. The comment by the New York Court of Appeals on this question is here appropriate.

> "The statement in the application upon which the order was based, even if untrue, was wholly immaterial, and an order revoking a license for a false statement cannot be predicated upon such a representation."
>
> *Matter of Haukins*, 165 N. Y. 188.

The concurring opinion of Judge Pound of the highest court of the State of New York in *Farley* v. *Miller*, 216 N. Y. 449, in dealing with an attempt to revoke a liquor certificate for alleged untruthful answers of the applicant in connection with its application, pointedly observed (at p. 458):

> "I concur in the result on the sole ground that, under the rule laid down in Matter of Moulton (59 App. Div. 25; affd., 168 N. Y. 645), although the answers to questions No. 11 and No. 34 were false, applicant would have been entitled to his certificate if he had stated the facts correctly, and the statements were, therefore, immaterial."

The authorities and discussion as set forth in our Point B hereof amply support our position that the commercial information and standards as prescribed in subdivision B of Section 4 (a)(2) of the Federal Alcohol Administration Act did not apply to the officers, directors or stock-

holders of the corporate applicant. The requirement of such information by the Administrator either in the application form or otherwise does not make material that which under the statute is not material. By Administrative Regulation the statute could not thus be altered or extended. *Morrill* v. *Jones* (supra).

Facts not material to the issuance of the permit may be sought in an application form or otherwise for statistical or other administrative reasons.

There were no undisclosed or unacceptable interests or persons.

It may not be successfully disputed that within the full meaning of the corporation law of the State of New York wherein the petitioner had been incorporated, the individuals named in the application as officers, directors and stockholders were such and had the rights and powers attributed to them according to the records of the applicant corporation and pursuant to law. The information, consequently, was correctly furnished in the application. The persons credited in the application with status as officers, directors and stockholders held such status formally and by corporate record. A failure to so list them would have been contrary to the records of the applicant and a misstatement. *Bombal* v. *Peoples State Bank*, 367 Illinois 113; *Doran* v. *Bay State Distributing*, 36 F. 2nd 657 (C. C. A. 1st).

Undeniably, all parties were actually disclosed in the application and could have been subjected to the routine of investigation. As a matter of fact they had been subject to investigation by the Administrator before issuance of the importer's permit (R. 83 & 771).

That the Administrator recognized the immateriality of the information alleged to have been concealed or misrepresented is disclosed by the fact that the Administrator

subsequently approved of Rappaport's ownership of stock by the failure of the Administrator to object to the transfers of the stock by SAMUEL BOMZON to SAMUEL W. RAPPAPORT (R. 683, 685, 695, 697). These transfers were reported to the Administrator and due note thereof was made by him as disclosed by his acknowledgments thereof (R. 684, 686, 699). Thus, without objection, the Federal Alcohol Administration had before it the full extent of the interest of SAMUEL W. RAPPAPORT in the applicant first as Vice-President and director, subsequently and prior to the commencement of the annulment proceedings as a major stockholder.

In addition to the foregoing it is briefly urged that the information sought as to applicant's officers, directors and stockholders concerning prior experience in the liquor industry (R. 88) quite naturally alluded to experience acquired under permit or license, in short, legitimate business experience. A request by a government authority for "business experience" involves business experience as distinguished from illegal activities. *United States* v. *Katz, et al.* (supra); *United States* v. *Jim Fuey Moy*, 241 U. S. 394.

Conclusion

It is respectfully submitted that the petition herein for a writ of certiorari to review the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit should be granted, and that the said judgment and decree be reversed, and that the orders annulling petitioner's basic permit as a wholesaler should be set aside.

Respectfully submitted,

WALTER BROWER,
Counsel for Petitioner.

COLEMAN GANGEL,
Of Counsel.

(5395)

INDEX

CITATIONS

626161—45

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 730

THOMAS J. MOLLOY & CO., INC., PETITIONER

v.

STEWART BERKSHIRE, AS DEPUTY COMMISSIONER OF THE BUREAU OF INTERNAL REVENUE, IN CHARGE OF THE ALCOHOL TAX UNIT, TREASURY DEPARTMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 971–978) is reported in 143 F. (2d) 218.

JURISDICTION

The order sought to be reviewed was entered on July 7, 1944 (R. 978). On September 13, 1944, the time for filing a petition for writ of certiorari was extended to December 5, 1944 (R. 980). The petition was filed on December 5, 1944. Jurisdiction of this Court is invoked under Section 4 (h) of the Federal Alcohol Administra-

tion Act, 49 Stat. 977, 27 U. S. C. 240 (h) and Section 204 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner has any standing to present the questions of statutory construction urged as the grounds for granting certiorari.

STATUTE INVOLVED

Section 4 of the Federal Alcohol Administration Act, 49 Stat. 977 (27 U. S. C. 204), provides in part as follows:

> (a) The following persons shall, on application therefor, be entitled to a basic permit:
>
> (1) Any person who, on May 25, 1935, held a basic permit as distiller, rectifier, wine producer, or importer issued by an agency of the Federal Government.
>
> (2) Any other person unless the Administrator finds (A) that such person (or in case of a corporation, any of its officers, directors, or principal stockholders) has, within five years prior to date of application, been convicted of a felony under Federal or State law or has, within three years prior to date of application, been convicted of a misdemeanor under any Federal law relating to liquor, including the taxation thereof; or (B) that such person is, by reason of his business experience, financial standing, or trade connections, not

likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted.

(b) If upon examination of any application for a basic permit the Administrator has reason to believe that the applicant is not entitled to such permit, he shall notify the applicant thereof and, upon request by the applicant, afford him due notice and opportunity for hearing on the application. If the Administrator, after affording such notice and opportunity for hearing, finds that the applicant is not entitled to a basic permit hereunder, he shall by order deny the application stating the findings which are the basis for his order.

(c) The administrator shall prescribe the manner and form of all applications for basic permits (including the facts to be set forth therein) and the form of all basic permits, and shall specify in any basic permit the authority conferred by the permit and the conditions thereof in accordance with the provisions of this Act. To the extent deemed necessary by the Administrator for the efficient administration of this Act, separate applications and permits shall be required by the Administrator with respect to distilled spirits, wine, and malt beverages, and the various classes thereof, and

with respect to the various classes of persons entitled to permits hereunder. The issuance of a basic permit under this Act shall not operate to deprive the United States of its remedy for any violation of law.

* * * * *

(e) A basic permit shall by order of the Administrator, after due notice and opportunity for hearing to the permittee, (1) be revoked, or suspended for such period as the Administrator deems appropriate, if the Administrator finds that the permittee has willfully violated any of the conditions thereof, provided that for a first violation of the conditions thereof the permit shall be subject to suspension only; or (2) be revoked if the Administrator finds that the permittee has not engaged in the operations authorized by the permit for a period of more than two years; or (3) be annulled if the Administrator finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact. The order shall state the findings which are the basis for the order.

Reorganization Plan No. III (54 Stat. 1231), prepared pursuant to the Reorganization Act of 1939 (53 Stat. 561), which became effective June 30, 1940, by Joint Resolution of June 4, 1940 (54 Stat. 230, 231), provided that the functions of the Administrator under the Federal Alcohol Admin-

istration Act "shall be administered under the direction and supervision of the Secretary of the Treasury through the Bureau of Internal Revenue in the Department of the Treasury." The Secretary of the Treasury delegated the functions of the Administrator "to the Deputy Commissioner of the Bureau of Internal Revenue in charge of the Alcohol Tax Unit, to be exercised by him under the direction and supervision of the Commissioner of Internal Revenue and the Secretary of the Treasury." (Treasury Department Order No. 30, 5 Fed. Reg. 2212). Subsequently these same powers were also delegated to the District Supervisors of the Alcohol Tax Unit, to be exercised by them subject to the supervision and direction of the Deputy Commissioner (Treasury Decision 4982, 5 Fed. Reg. 2549).

STATEMENT

On October 26, 1935, petitioner applied for a basic wholesaler's permit (R. 93) on a form (R. 600–601) prescribed by the Administrator of the Act under the authority of Section 4 (c). The applicable instructions (R. 86–92) required the applicant to supply an affidavit describing the persons who owned and managed the applicant, their prior connections, if any, with the liquor industry, and a detailed statement of the business experience of the applicant, its directors and officers, and its stockholders who owned 10 percent or more of the capital stock (R. 88–89).

The information required by the application with respect to the business history of certain officers and stockholders of the applicant was at first omitted (R. 615) and then falsified when the Administrator declined to consider the application without it (R. 617).[1] This falsification consisted in representing that the principal owners and officers of the applicant had been engaged in legitimate enterprises during the period of national prohibition, whereas they had, in fact, been bootleggers (R. 101, 901). The application also falsified statements as to the amount of stock bought by various owners to make it appear that stock amounting to a controlling interest which was actually owned by two of the former bootleggers was owned instead by a banker and preprohibition operator of a legitimate liquor business (R. 94–95, 902). A wholesaler's basic permit was thereafter issued on the application, without a hearing, on July 1, 1936 (R. 609–610).

On April 25, 1940, the Administrator began a proceeding to annul the petitioner's wholesaler's permit and its importer's permit upon the ground that they had been obtained by fraud, misrepresentation and concealment of material fact (R. 26–30). On May 25, 1940, the petitioner answered, claiming, *inter alia,* that it was entitled to the issuance of both permits as a matter of right because it had held an importer's permit on

[1] The original affidavit appears at R. 94–100 and the additional affidavit supplying the requested data is at R. 100–103.

May 25, 1935 (R. 33), and that the owners and managers of the business charged with previously engaging in bootlegging had not been convicted of any of the offenses described in Section 4 (a) (2) A of the Act (R. 38). The proceeding was abandoned as to the importer's permit prior to the hearing, which began on September 9, 1941 (R. 879). At the conclusion of the hearing, the hearing officer found that the petitioner had misrepresented to and concealed from the Administrator material facts in obtaining the wholesaler's permit and recommended its annulment (R. 912–913). An order of annulment was entered by the respondent District Supervisor on April 8, 1942 (R. 914–920). An application for reconsideration was granted and the order sustained after argument before the District Supervisor on May 18, 1942 (R. 935). Upon a further review of the record by the Deputy Commissioner, at the request of the petitioner, the order was affirmed by him on August 6, 1942 (R. 951–952). An appeal was taken to the Circuit Court of Appeals for the Second Circuit pursuant to the provisions of Section 4 (h) of the Act. That court affirmed the Deputy Commissioner's order by its order of July 7, 1944 (R. 978) which petitioner now seeks to have reviewed.

ARGUMENT

Petitioner attacks the Administrator's construction of Section 4 on various grounds. They are sufficiently disposed of in the opinion of the Cir-

cuit Court of Appeals (R. 972–975). We submit, however, that petitioner has no standing to present the questions of statutory construction which it urges as a basis for the granting of certiorari. Petitioner has argued the propriety of the administrative action in this record as though it were appealing from a denial of a permit on the ground that it was legally unfit to hold one instead of the annulment of a permit on the ground that it was obtained by illegal means. It is not disputed that the permit was obtained without a hearing by a misrepresentation of facts thought to be material by both the Administrator of the Act and the petitioner at the time of issuance. The only claim of immateriality is that under a different construction of the statute than that adopted by the Administrator and acquiesced in by the petitioner in the issuance of the permit, the petitioner might have obtained the permit as a matter of right or, upon a hearing, might have persuaded the Administrator that the owners would operate the business in conformity with federal law, notwithstanding their prior bootlegging activities. Neither the Administrator nor the court below made any findings as to the effect to be given the former bootlegging activities of the principal owners and officers of the petitioner in determining the Government's right to withhold the issuance of a permit under Section 4 (a) (2) as petitioner avoided the preissuance hearing under Section 4 (b), in which

such a determination would ordinarily be made, by concealing that bootlegging history and control from the Administrator.

Although petitioner now seeks a review by this Court of the construction of Section 4 (a), adhered to by all parties when the permit was issued and by the Administrator and the court below in this proceeding, the sole purpose of the proceeding was to determine whether or not petitioner had fraudulently procured the permit within the meaning of Section 4 (e) (3). No legislative history, court decisions or legal materials have been cited by petitioner to suggest that Section 4 (e) (3) means anything other than what it says. The policy embodied in this section of the Act is simply one aspect of the general policy of the Government to require those who seek benefits from it to make honest statements in procuring them. The basic statute embodying this requirement is Section 35 (A) of the Criminal Code, 18 U. S. C. 80, originally passed in 1909 to punish criminally the making of false claims but broadened in 1934 to include the willful making or using of any fraudulent statements in matters over which a federal agency has jurisdiction. In *United States* v. *Gilliland,* 312 U. S. 86, the Court said that this amendment "indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive

practices described" (p. 93). In carrying out this policy, Congress has also frequently resorted to statutory provisions, such as Section 4 (e) (3), which deprive persons of the specific benefits procured by dishonest statements to particular governmental agencies.[1]

That petitioner has no right to a review of the Administrator's construction of Section 4 (a) in this proceeding is established by *United States* v. *Kapp*, 302 U. S. 214, and *Kay* v. *United States*, 303 U. S. 1. In the former case, the Court held that a defendant charged with conspiring to violate Section 35 (A) of the Criminal Code by making fraudulent representations in order to procure benefit payments under the Agricultural Adjustment Act of 1933 could not question the authority of the Secretary of Agriculture to require the furnishing of the information in question even though the Act which granted it had been declared unconstitutional in *United States* v. *Butler*, 297 U. S. 1. In so holding the Court said (p. 218):

> It is cheating the Government at which the statute aims and Congress was entitled to protect the Government against those

[1] Cf. 30 U. S. C. 227, punishing fraud or dishonest conduct in procuring leases on Navy petroleum reserves by depriving persons guilty thereof of the benefits of such leases; 45 U. S. C. 354, punishing the making or aiding in making of fraudulent statements to procure railroad unemployment insurance benefits by depriving persons guilty thereof of such benefits.

> who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. Such questions cannot be raised by those who make false claims against the Government.

In the *Kay* case the Court held that the constitutionality of the Home Owners' Loan Act was immune to attack in a proceeding charging a violation of Section 8 (a) of that Act, 12 U. S. C. sec. 1467 (a), which punishes the making of false representations for the purpose of influencing action on a loan application. In so holding, the Court said (p. 6):

> There is no occasion to consider this broad question as petitioner is not entitled to raise it. When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.

A fortiori, one who misleads an administrative officer of the Government by false statements has no standing to assert that the proceeding in which the statements were made was without statutory sanction.

CONCLUSION

The decision below is correct and no question of statutory construction is presented. It is

respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
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WENDELL BERGE,
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ROBERT L. WRIGHT,
Special Assistant to the Attorney General.

JANUARY 1945.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 730

THOMAS J. MOLLOY & CO., INC.,
Petitioner,

vs.

STEWART BERKSHIRE, as Deputy Commissioner of the Bureau of Internal Revenue, in Charge of the Alcohol Tax Unit, Treasury Department; HENRY MORGENTHAU, JR., Secretary of the Treasury, and D. W. GRIFFIN, District Supervisor, Alcohol Tax Unit, Bureau of Internal Revenue, Second District of New York.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A REHEARING OF PETITION FOR WRIT OF CERTIORARI

WALTER BROWER,
Counsel for Petitioner.

WALTER BROWER,
COLEMAN GANGEL,
Of Counsel.

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PETITION FOR A REHEARING OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Harlan F. Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Thomas J. Molloy & Co., Inc., respectfully prays for a rehearing of its petition for a writ of certiorari heretofore filed and denied by this Court on January 29th, 1945.

1. Petitioner deems it necessary to ask for a rehearing for the reason that respondents' brief in opposition entirely

avoided the legal questions presented by petitioner and the alleged errors in the decision of the Circuit Court of Appeals but rests entirely on a basis and theory not asserted in the Administrator's proceedings and which the Circuit Court of Appeals completely rejected.

2. The petitioner is further impelled to ask for a rehearing of its petition for a writ because the respondents have failed entirely to answer or even argue against the validity of the pertinent contentions urged by petitioner in the Circuit Court of Appeals or in its petition submitted to this Court, although the questions raised by the petitioner in its petition for a writ are basic and fundamental to the construction and administration of the Federal Alcohol Administration Act (27 U. S. C. 201 etc., 49 Stat. 977).

3. Despite the fact that petitioner's basic permit was annulled under Section 4 (e)(3) of the Federal Alcohol Administration Act on the alleged ground of misrepresentation of *material facts* in connection with the application for the permit in question, respondents have failed since to justify the annulment on that ground but have cited cases to the Circuit Court of Appeals and later to this Court which involve criminal prosecutions under unrelated statutes in which materiality of representation is not a prerequisite to guilt or responsibility, as it is under Section 4 (e) (3) of the Act.

4. Respondents cited the same cases to and presented the same argument of this matter before the United States Circuit Court of Appeals and evoked from the presiding judge there the comment that the argument was not sound and the cases cited not material.

5. The respondents' hearing officer stated in his report and findings as basis for the annulment recommended, that the principal issue is whether the permit was procured

through fraud or misrepresentation or concealment of *material facts* (R. 905).

6. Unless the alleged, false statements were material, they may not be the basis of an annulment proceedings under Section 4 (e)(3). These statements may not be deemed to have been material unless the information was requisite to the issuance of a permit under the Statute. Only a judicial statutory contruction can determine this particularly in the light of the contention that the Administrator has exercised discretionary powers which neither the Statute nor the Legislative history thereof purports to invest in him.

7. Despite the basic questions raised by the petitioner in the proceedings in the Circuit Court of Appeals and the subsequent petition filed herein, involving questions of construction of the statute and the respondents' powers thereunder, an answer to or discussion of petitioner's contentions have been significantly avoided by respondents.

8. Respondents have chosen to resist petitioner's proceedings in the Circuit Court of Appeals and the petition for writ in this Court on the entirely irrelevant point of estoppel, notwithstanding the fact that Section 4(e)(3) of the Federal Alcohol Administration Act under which petitioner's permit was annulled requires as the basis of such action a misrepresentation of *material facts,* and contains the full extent of penalty to be inflicted upon those within its purview.

9. The questions presented by the petitioner are vital not alone to it but a construction of the Statute and the extent of the Administrator's powers thereunder are of tremendous importance to an immense industry throughout the land. This Court has never ruled on the subject nor have

the respondents hazarded argument in justification of their construction of the Statute in question.

10. It is respectfully submitted that respondents' complete avoidance of the issues so raised in this as well as in the Circuit Court, calls for an expression by this Court on the questions presented in the petition for a writ as they affect the rights of petitioner and all others affected by the administration of the Federal Alcohol Administration Act.

WHEREFORE, petitioner respectfully prays that a rehearing of its petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit be granted, and that upon such rehearing the petition be granted and a writ as therein prayed for be issued.

THOMAS J. MOLLOY & CO., INC.,
By WALTER BROWER,
Attorney for Petitioner.

WALTER BROWER,
COLEMAN GANGEL,
Of Counsel.

Certificate

I, Walter Brower, of counsel for the petitioner, hereby certify that the foregoing petition is submitted in good faith and not for the purpose of delay.

WALTER BROWER.